manufactured parts and equipment on oil and gas platforms along the Louisiana Gulf Coast.

Instead of hiring United States citizens as welders and machinists to perform its work, Offshore Specialty Fabricators hired petitioners who were admitted to the United States as "seamen" and were required to work at Offshore Specialty Fabricators's fabrication yard in the swamps of Houma, Louisiana.

Petitioners lived and worked in the fenced in, labor-camp-like fabrication yard and on various barges moored to the labor camp. On some occasions, one of the barges would be towed to the Gulf of Mexico to a work site and, after installing the manufactured parts and equipment, returned to the fabrication yard.

Petitioners each worked twelve (12) hours per day, seven (7) days a week for periods of up to six (6) months. Petitioners were required to live on the premises at Offshore Specialty Fabricators which was enclosed by a chain-link fencing, topped with razor wire. Ingress and egress was through a guarded gate. During non-work hours petitioners were not allowed to leave the premises. Any employee escaping the premises was apprehended and returned by the local sheriff. Working and housing conditions of petitioners were tantamount to incarceration. All petitioners were paid below the United States minimum wage of $5.15 per hour as required by 29 U.S.C. § 206.

In order to obtain an exit visa from the Philippines to travel to the United States, each petitioner was required to sign a standard Philippine Overseas Employment Contract setting forth the terms and conditions of employment. This contract, consisting of one (1) page,

contains NEITHER a forum selection clause, nor a choice of law clause, nor an arbitration clause. However, Offshore Specialty Fabricators contends that a separate twenty-nine (29) page document entitled "Standard Terms and Conditions Governing the Employment of Philippine Seafarers On-Board Ocean Going Vessels" is applicable to the case herein, and specifically Section 29 on page 13 entitled "Dispute Settlement Procedures". Petitioners did not sign this twenty-nine (29) page document and deny any knowledge of its existence or its provisions.

Petitioners filed this action in the United States District Court for the Eastern District of Louisiana claiming violations of the minimum wage and overtime requirements of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. Petitioners' First Amended Complaint made this an opt-in collective action, pursuant to 29 U.S.C. § 216(b) and approximately one hundred (100) similarly-situated Filipino seamen have opted in.

Based on the Section 29 arbitration clause in the aforementioned non-contractual document, Offshore Specialty Fabricators moved to dismiss petitioners' claims based on lack of subject matter jurisdiction, FRCP 12(b)(1) and improper venue, FRCP 12(b)(3). However, at no time did Offshore Special Fabricators move to compel arbitration or seek a stay of United States proceedings, as required under 9 U.S.C. § 3.

The District Court denied the Motion to Dismiss, noting this Court's holding in *M/S Bremen v. Zapata Offshore Company*, 407 U.S. 1, 92 S.Ct. 907, 32 L.Ed.2d 513 (1972), that "[a] contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum (in) which suit is

brought, whether declared by statute or judicial decision". 407 U.S. at 15, 92 S.Ct. at 1916 [citations omitted]. The District Court further found Louisiana's public policy does not allow enforcement of forum selection clauses in employment contracts. This public policy is set forth both by statute and judicial decision, namely, Louisiana Revised Statute 23:921(A)(2) and the Louisiana Supreme Court decision in *Sawicki v. K/S Stavanger Prince*, 802 So.2d 598, 603 (La. 2002).

SUMMARY OF THE ARGUMENT

This Court's binding precedent in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971) clearly demands that seafarers have a right to a judicial forum for wage disputes. The decision below is contrary to the Arguelles' holding by requiring seaman to arbitrate wage claims.

This Court's binding precedent in *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) provides that forum selection clauses or mandatory arbitration clauses are unenforceable if the clause violates the public policy of the forum in which suit is brought. Both federal and state public policies are violated when courts require arbitration of claims arising out of contracts of employment of seamen. 9 U.S.C. § 1. *See also, Boyd v. Grand Trunk, W.R. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949), "contracts limiting the choice of venue are void as being in conflict with the provisions of the Federal Employees Liability Act"; *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) "a contractual choice-of-forum clause should be held

unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision". La. R.S. 23:921(A)(2) forbids enforcement of any forum clause in any employment contract unless the employee ratifies it after the occurrence of the instance which is subject of the civil action. *Sawicki v. K/S Stavanger Prince*, 802 So.2d 598 (La. 2002) judicially bans forum selection clauses in contracts of employment of foreign seafarers.

A Seamen's Employment Contract is not a Commercial Contract which falls under the Convention on the Recognition of Foreign Arbitral Awards. In adopting the Convention, the United States did so with the declaration that the Convention would only be applied to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States". The national law of the United States is found in 9 U.S.C. § 1, and specifically excludes "contracts of employment of seamen".

ARGUMENT

I. Mandatory Arbitration in Seamen's Wage Litigation Violates this Court's Longstanding Precedent set forth in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971).

Arbitration has never been required in seamen's wage litigation. This exact issue was decided by this Court in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). In *Arguelles*, a seaman brought a suit for wages which accrued from services

rendered in foreign commerce. The collective bargaining agreement executed by Mr. Arguelles with his employer provided for a grievance procedure and for arbitration of disputed claims. The District Court granted the shipowner/employer's motion for summary judgment and the Court of Appeals reversed by a divided vote. This court stated the question to be:

> . . . whether the earlier, express, and alternative method of collecting seamen's wages contained in 46 U.S.C. § 596 has been displaced by Section 301 of the Labor Management Relations Act or whether so far as seamen and their wages are concerned Section 301 is only an optional method of resolving the controversy.

400 U.S. at 352.

This Court noted that the "federal courts remained as the guardians of seamen, the agencies chosen by Congress, to enforce their rights – a guardian concept which, so far as wage claims are concerned, is not much different from what it was in the eighteenth century". *Id.* at 355. In reversing, this Court refused to require Mr. Arguelles to engage in arbitration finding that there was no suggestion in the legislative history that arbitration was " . . . to assume part or all of the role served by the federal courts protective of the rights of seamen since 1790". *Id.* at 356.

The Fifth Circuit refused to follow this Court's holding in *Arguelles*, and instead has required the instant seamen to arbitrate their wage claims. In its ruling below, the Fifth Circuit distinguished *Arguelles*, using the following rationale when departing from this Court's well-established precedent:

> First, the claims in *Arguelles* addressed seamen's judicial remedies for **contractual** wages. *Id.* at 354, 91 S.Ct. 409. Plaintiffs do *not* claim they were not paid according to their contract; instead, they make claims under the FLSA for **extra-contractual** wages. Also at issue in *Arguelles* was the duty to follow the collective bargaining grievance procedure under the LMRA, a statute and procedure absent here. [emphasis added] 404 F.3d at 907.

The Fifth Circuit is wrong. As this Court noted in *Arguelles*, a seaman's claims for wages arose not from his contract, but instead from the collective bargaining agreement:

> Arguelles' suit, unlike Maddox' suit, is **not 'simply on the contract'**; he invokes the court's jurisdiction seeking, in addition to the overtime wages allegedly due him under the collective-bargaining agreement, **a statutory claim** for refusal or neglect to pay his wages according to the timetable prescribed in 46 U.S.C. § 596 'without sufficient cause.' In this circumstance, the presumption of the arbitral remedy is, in my view, rebutted. [emphasis added] 400 U.S. at 362.

Even the dissent in *Arguelles* agreed that the claims before the court were not simply contractual, but were extra-contractual wages due from the collective bargaining agreement:

> The merits of respondent's non-statutory claims depend entirely on interpretation and application of the bargaining agreement.

400 U.S. at 371.

The Fifth Circuit's outcome-based decision below is indistinguishable from *Arguelles* on the issue of contractual versus extra-contractual wage claims.

The Fifth Circuit next attempted to distinguish *Arguelles* because Mr. Arguelles was asserting a wage claim pursuant to a collective bargaining grievance procedure under the LMNA. The Fifth Circuit found that because the LMNA statute and procedure is not present in the case below that *Arguelles* need not be adhered to, even though the relevant statutes under consideration before this court are those contained in Chapters 1 and 2 of Title 9. Those statutes provide procedures to secure the enforcement of arbitration agreements in certain commercial contracts just as Section 301 does in the LMNA. The statutes and procedures that exist in this case and *Arguelles* are virtually identical. Any distinction drawn between the statutes is nominal, rather than substantive.

The Fifth Circuit noted as its final justification for finding *Arguelles* distinguishable:

> Finally, while the *Arguelles* court refused to hold Section 301 of the LMRA replaced-access to courts, **the court did not declare seamen's wages conclusively exempt from arbitration in all situations.** *Id.* at 593, 91 S.Ct. 409. Seamen may, if they choose, "use the process of grievance and arbitration". 404 F.3d at 907.

In the Fifth Circuit, according to the current holding in the case below, this Court's longstanding holding in *Arguelles* banning arbitration in the seamen wage arena has in fact been overruled.

II. Mandatory Arbitration Violates Public Policy and this Court's Precedent found in *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)

This Court has always taught that arbitration clauses are merely sub-sets of forum selection clauses. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974). In *M/S Bremen*, this Court enunciated four separate grounds which would justify finding a choice of forum clause to be unenforceable:

1. enforcement would be unreasonable and unjust;
2. fraud, undue influence;
3. overreaching; or
4. enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision. 407 U.S. at 15, 92 S.Ct. at 1916.

The Federal Fifth Circuit has drastically narrowed this Court's binding precedent in *M/S Bremen* by making the public policy exception a sub-part of the "reasonableness" exception. Specifically, the Federal Fifth Circuit stated:

> The Supreme Court has held forum selection clauses in international contracts are "prima facie valid" and should be upheld absent a clear showing of unreasonableness, unjustness, overreaching, or fraud. *M/S Bremen* held a choice of forum clause may be **unreasonable** when "enforcement would contravene *a strong* ***public policy*** *of the forum in which suit is brought*, whether declared by statute or decision". *Id.* at 15, 92 S.Ct. 1907 (emphasis added). The Convention mirrors

> this policy concern by allowing a court charged with enforcing an arbitral award to refuse enforcement if "[t]he recognition or enforcement of the award would be contrary to ***the public policy of that country***". Convention, Art. V. § 2(b) (emphasis added).
>
> Forum is broadly defined as "[a] court or other body; a place of jurisdiction". BLACK'S LAW DICTIONARY (8th ed. 2004). In performing the instant *M/S Bremen* **reasonableness analysis**, an underlying issue is which forum – the United States or Louisiana – is relevant for purposes of the test. 404 F.3d at 904.
>
> * * *
>
> Further, for obvious reasons, when analyzing the **reasonableness** of a choice of forum clause in an international contract, courts do not ignore federal law and policy. [emphasis added] 404 F.3d at 905.
>
> * * *
>
> Accordingly, we will consider both United States and Louisiana **public policy** in *M/S Bremen* **reasonableness analysis**. 404 F.3d at 905.
>
> * * *
>
> Plaintiffs do not meet the "high burden of proof" necessary to show **public policy** renders the arbitration clause **unreasonable**. [emphasis added] 404 F.3d at 906.

Contrary to the drastic semantical changes attempted by the Fifth Circuit which in effect increases the public policy burden of proof, plaintiffs herein need not show that the public policy of the forum renders the arbitration clause unreasonable. **Plaintiffs need only to show that**

the forum selection clause violates the public policy of the forum. *M/S Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916 (citing *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949)). This Court has made clear that the arbitration clause is unenforceable if it is contrary to a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision, regardless of whether the clause is reasonable or not. *Id.* The public policy exception is not a sub-part of the "reasonableness" factor. This Court's holdings should not be limited by the lower courts. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017 (1997). This court did not declare choice of forum clauses unreasonable and unenforceable when in violation of public policy of the forum – this Court mandated that choice of forum clauses were unenforceable if "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision". *M/S Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916.

The public policy of the forum of the United States and public policy of the State of Louisiana are virtually identical. Both federal and state public policy favor arbitration in general. Louisiana's Arbitration Act, La. Rev. Stat. 9:4201, *et seq.*, is nearly identical to the Federal Arbitration Act and Louisiana courts rely heavily on federal law in interpreting its own arbitration act. *Dufrene v. HBOS Mfg., LP*, 872 So.2d 1206 (4th Cir. 2004).

However, while both federal and state public policy strongly favor enforcement of arbitration agreements in general, neither federal nor state public policies allow for arbitration of claims arising out of contracts of employment of seamen.

On the federal level, Chapter 1, Section 1 of the Federal Arbitration Act specifically exempts contracts of employment of seamen from the operation of the entirety of Title 9 by declaring that they are not commercial. 9 U.S.C. § 1. This court further enunciated the public policy of this nation in *Boyd* by stating that the contracts limiting the choice of venue are void as being in conflict with the provisions of the Federal Employees Liability Act. *See also M/S Bremen*, 407 U.S. at 15 (citing *Boyd* for the proposition that "a contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision"). Moreover, this Court reaffirmed the national public policy in *Arguelles* by holding that seamen are not required to arbitrate their wage claims.

On the state level, the Louisiana Arbitration Act, La. Rev. Stat. 9:4216 exempts contracts of employment of labor from arbitration.[1] The public policy of Louisiana is likewise set forth in the provisions of La. R.S. 23:921(A)(2) which forbids enforcement of any forum clause in any employment contract unless the employee ratifies it after the occurrence of the instance which is subject of the civil action. The Louisiana Supreme Court found that this statute expressed the public policy of the state of Louisiana and was consistent with this Court's teaching in *M/S Bremen* and held forum selection clauses in contracts of

[1] Likewise, the State of Alaska has held that any forum selection clause within an employment contract is invalid it if violates a seaman's right to sue under the Jones Act in any eligible forum. *Nunez v. American Seafoods*, 52 P.3d 720 (Alaska 2002).

employment of foreign seafarers to be unenforceable. *Sawicki v. K/S Stavanger Prince*, 802 So.2d 598 (La. 2002).

The public policy of the United States was never intended to subject seamen's contracts to arbitration. Chapter 1, Section 1, entitled " ... exceptions to the operation of title". One of the exceptions to the operation of the entirety of Title 9 that is clearly listed in Section 1 is that " ... nothing herein contained shall apply to **contracts of employment of seamen**, railroad employees or any other workers engaged in foreign or interstate commerce". This exception was inserted by Congress at the urging of Andrew Furuseth, President of the International Seaman's Union, who feared that without the exception, three seaman statutes would be jeopardized: the seaman wage statute, the Jones Act and the Death on the High Seas Act. Matthew Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J. Emp. & Lab. Law 282, 288 (1996). According to Furuseth, requiring seaman to arbitrate would result in "compulsory labor" because "arbitration might require a seaman to remain on or return to a ship even though under the Seaman's Act he would have the right to leave". David Feller, *Putting Gilmer Where It Belongs: The FAA's Labor Exemption*, 18 Hofstra Lab. & Emp. L.J. 253, 263 (2000).

United States Courts have always held that the provisions and exceptions of 9 U.S.C. § 1 were applicable to the Convention. *See Star-Kist Foods, Inc. v. Diakav Hope, S.A.*, 423 F.Supp. 1220 (D.C. Cal. 1976) [where the court specifically used the definitions contained in 9 U.S.C. § 1 to enforce an arbitration agreement under 9 U.S.C. § 201]. In *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co. (PEMEX)*, 767 F.2d 1140 (5th Cir. 1985),

Judge Brown noted that " . . . the Convention replicates the Federal Arbitration Act. Indeed, Section 208 of the enabling legislation of the Convention **incorporates all of the Convention** into Chapter One of Title 9". *Id.* at 1146. In addition, this Court has applied the definitions of and exceptions found in Chapter 1 of the FAA to the Convention, "The FAA requires enforcement of arbitration agreements in international contracts . . . and in maritime transactions, including bills of lading, ***see*** **9 U.S.C. §§ 1, 2, 201, 202** where there is no independent basis in law or equity for revocation". *Vimar Seguros y Reasguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (internal cites omitted). This Court, like Congress, clearly envisioned Chapters 1 and 2 of Title 9 to be read in *pari materia*.

The Fifth Circuit has held that the Exceptions found in Chapter 1 are in conflict with Chapter 2 even though by definition, an exception to a statute will always be in conflict with the substance of the statute from which the subject of the exception is carved out. *Francisco v. M/V Stolt Achievement MT*, 293 F. 3d 270 (5th Cir. 2002). *See* Singer, *Sutherland Statutes and Statutory Construction* (6th ed.) § 20:22 (2004) ["When a draftsman wishes to limit the operation of a general rule, he should always do so by a separate section entitled 'Exception'. In drafting an exception, the draftsman should indicate whether it is to operate as a limitation on the section immediately preceding it or upon the operation of the entire act". The Exception will apply equally over the entire act unless it is specifically designated otherwise.].

III. A Seaman's Employment Contract is not a Commercial Contract which Falls under the Convention on the Recognition of Foreign Arbitral Awards

Contracts of employment of seaman are not "commercial" under the National Law of the United States and are therefore excluded from the Convention. The United States, in adopting the Convention, exercised the reservation allowed by Article I(3) of the Convention, which permits a contracting state to apply the Convention only to legal relationships that are considered **commercial** under the national law of that state. 9 U.S.C. § 201, Note 58. In adopting the Convention, the United States did so with the following declaration:

> "The United States of America will apply the Convention ***only*** to differences arising out of legal relationships, whether contractual or not, which are considered as **commercial** under the **national law** of the United States". (Emphasis Added) (9 U.S.C. § 201, Note 58)

The national law of the United States on arbitration is found in 9 U.S.C. § 1 which defines commercial as specifically excluding seafarers' contracts of employment. *See*: S. Rep. No. 536, 68th Cong., 3 (1924). ("The 'maritime transactions or contracts' to which the bill will apply are defined in section 1".) *See also*: *Letter from Herbert Hoover, Secretary of Commerce, to Senator Thomas Sterling (Jan. 23, 1923), reprinted in Hearing on S. 4213 and S. 4214 Before 9 Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 14 (1923).* This is evidenced by reviewing the transcript from the Committee on Foreign Relations when it was considering Senate Bill 3274 which implemented the Convention. The testimony at the Committee made it

absolutely clear that the definition of commerce (which, according to 9 U.S.C. § 1, excludes therefrom seamen's employment contracts) was the **national law** definition for the purpose of the **declaration** ratifying the Convention:

> The letter to the Vice President transmitting the legislation explains the reason for the change in plans, which was basically to avoid the confusion which might result from a series of minor changes in the different sections of the Arbitration Act as between cases falling under the act in its present form and cases falling under the Convention.
>
> The kind of problem that we wished to avoid is well illustrated by section 202 of the new chapter 2. This section defines the arbitral agreements or awards that are considered to fall under the Convention for purposes of the implementing legislation.
>
> Paragraph 1 of article I of the Convention provides that the Convention applies to the recognition and enforcement of arbitral awards without any limitation as to the nature of the relationship that gave rise to the award. It might, for example, be a question of family status. However, paragraph 3 of article I of the Convention permits a state party to the Convention to file a declaration that the Convention will apply only to legal relationships that are considered as commercial under the national law of that state. *As was stated in the hearings on the Convention, the United States will file such a declaration because our purpose in adhering to the Convention is for the beneficial effects it will produce for the foreign commerce of the United States and not make any*

changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union.

Consequently it is necessary to include the substance of this limiting declaration in the legislation that implements the Convention. This is what the first sentence of section 202 intends. It was not, of course, necessary to make any reference to the national law of the United States in the first sentence of section 202 because the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration. A specific reference however, is made in section 202 to section 2 of title 9, which is the basic provision of the original Arbitration Act.

* * *

The declaration limiting the application of the Convention to commercial matters applies both to the recognition and enforcement of arbitral awards under article 1 of the Convention and to the recognition of an agreement to arbitrate under article 2 of the Convention. Consequently the provisions of section 202 or the implementing legislation are applied specifically both to enforcement of arbitration agreements and arbitral awards". (Emphasis added) S. Report No. 91-702, 91st Congress, 2d Session, Pg. 5-7 ("Exhibit 1")

The legislative history of the enactment of the Convention clearly establishes that the exclusion of employment contracts for seamen contained in 9 U.S.C. § 1 is

incorporated into the provisions of 9 U.S.C. § 202, and is further consistently evidenced by the commentators' discussions of Section 202 of the Convention. Susan L. Karamanian, Associate Dean for International and Comparative Legal Studies at George Washington University has opined:

> In acceding to the Convention, the United States elected the Commercial Declaration. In the Convention Act, however, Congress never defined "commercial". Nothing in the Convention Act precludes a court from defining "commercial" to exclude seamen's employment contracts consistent with the Domestic FAA's Section 1.
>
> If anything, a reading that . . . seaman's claims are not arbitrable gives full effect to section 202. In section 202, Congress provided that "a transaction, contract or agreement described in section 2 of [title 9] falls under the Convention". Section 2 of the Domestic FAA requires enforcement of a written provision in a contract evidencing a transaction "involving commerce" to settle disputes by arbitration. Section 2, however, is subject to the exemptions of section 1, which include the exemption for seamen's employment contracts. *The Road to The Tribunal And Beyond: International Commercial Arbitration And United States Courts,* 34 George Washington International Review 17, 65 (2002).

See also, McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States,* 2 Journal of Maritime Law and Commerce 735, 743-744 (1971) ["The United States has ratified subject to the commercial matters reservation and the statute reflects its decision to do so; however, the Act does not

define commercial relationships. The legislative history indicates that the definition of commerce contained in Section 1 of the Federal Arbitration Act of 1925 is the national law definition of "commercial" for purposes of the reservation".]; Comment, McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 Journal of Maritime Law and Commerce 735, 743-744 (1971) [" There was no need to provide for a definition for commerce in Section 202 because there is already a definition in Section 1 of the original Arbitration Act. That definition refers both to interstate and foreign commerce".].

The Restatement of Foreign Relations Law (3rd) is in agreement with this position:

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* * *

> ***f. Requirement of commercial relationship.*** For most states' parties, the Convention applies to all private arbitral agreements, regardless of the subject matter. However, 25 of the 69 parties to the Convention (as of 1986), including the United States and France (but none of the other major trading states), made a declaration, as authorized by Article I(3), that the Convention would be applicable "only to differences arising out of legal relationships whether contractual or not, which are considered commercial under the national law of the State making such declaration". **This declaration *excludes* arbitration agreements and awards arising out of matrimonial or custody disputes, disputes concerning succession to property, and labor disputes, *and for the United States also***

other disputes excluded from the United States Arbitration Act under 9 U.S.C. § 1.

Thus, it is abundantly clear that seamen's maritime contracts do not arise out of a **commercial** legal relationship, thereby precluding application of the Convention as acceded to by the United States in cases involving seamen's contracts. If Chapter 1 of Title 9 does not provide the definition of "commercial" for the reservation allowed by Article I(3) of the Convention, then where would one find the meaning of the reservation which the United States agreed to in acceding to the Convention?

The application of a contractual arbitration clause to a seaman's wage claim is a violation of both federal and state law and, as such, the contract in question should be declared illegal and unenforceable. Specifically, this Court has held that arbitration is merely a[n] optional method of resolving wage controversies, not a mandatory method. *Arguelles*, 400 U.S. at 357, 91 S.Ct. at 413. This Court has held that provisions which limit employee's choices of judicial venues are void. *Boyd*, 338 U.S. at 265, 70 S.Ct. at 27.

Additionally, La. R.S. 23:921(A)(2) specifically renders unenforceable contracts of employment of seamen that provide a restrictive choice of forum or arbitration venue. The Louisiana Supreme Court in *Sawicki* found that our public policy was consistent with *M/S Bremen* and that arbitration forum clauses were thus unenforceable. As such, and pursuant to the dictates of 9 U.S.C. § 202, it is respectfully submitted that the arbitration clause at issue is unenforceable.

CONCLUSION

The United States Court of Appeals for the 5th Circuit has drastically limited the Admiralty jurisdiction of the lower federal courts and departed from this Court's well established precedent by forcing traditional wards of the admiralty court to arbitrate claims for statutory wages. This Court must intervene now in order to uphold the constitutional and statutory protections afforded to its wards.

Respectfully submitted,

RICHARD J. DODSON, Bar Roll No. 4982
KENNETH H. HOOKS, III, Bar Roll No. 25097
DODSON & HOOKS, APLC
One Maritime Centre
17405 Perkins Road
Baton Rouge, Louisiana 70810
Telephone (225) 756-0222
Counsel for Joselito Madriaga Lim, Et Al.

and

W. STEVEN MANNER, Bar Roll No. 9098
MICHAEL A. COLOMB, Bar Roll No. 1035
POYNTER, MANNEAR & COLOMB, APLC
17405 Perkins Road
Baton Rouge, Louisiana 70810
Telephone (225) 756-5755
Counsel for Joselito Madriaga Lim, Et Al.

404 F.3d 898

United States Court of Appeals,
Fifth Circuit.

Joselito Madriaga LIM, on behalf of himself and all other current and former employees of Offshore Specialty Fabricators, Inc., similarly situated; Adelito M. Aganon; Richard Agcaoili; Luis Agnabo; Antonio P. Alcantara; et al.,
Plaintiffs-Appellees,
and
Mario M. Cabanlit, on behalf of himself and all other current and former employees of Offshore Specialty Fabricators, Inc., similarly situated; Jimmy Gadlaw Lim, on behalf of himself and all other current and former employees of Offshore Specialty Fabricators, Inc., similarly situated,
Plaintiffs-Intervenor Plaintiffs-Appellees,
v.
OFFSHORE SPECIALTY FABRICATORS, INC.,
Defendant-Intervenor Defendant-Appellant.

No. 03-30380.

March 24, 2005.

William Steven Mannear (argued), Poynter, Mannear & Colomb, Baton Rouge, LA, for Plaintiffs-Appellees.

Cornelius R. Heusel, Jennifer Lynn Anderson (argued), Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA, for Offhore Specialty Fabricators, Inc.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WIENER, BARKSDALE and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

In this 28 U.S.C. § 1292(b) interlocutory appeal, Offshore Specialty Fabricators, Inc. (OSFI), challenges the denial of its motions to dismiss for lack of subject matter jurisdiction and for improper venue. *See* Fed.R.Civ.P. 12(b)(1), (b)(3). Plaintiff seamen are residents and citizens of the Philippines. Their international employment contracts at issue, controlled by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C.A. § 201 note (hereinafter, Convention), require arbitration of plaintiffs' Fair Labor Standards Act claims, notwithstanding exceptions claimed by plaintiffs. (One claimed exception is pursuant to a Louisiana statute which expresses that State's strong public policy against forum selection clauses in employment contracts.) VACATED and REMANDED.

I.

OSFI, a Louisiana corporation, employed Joselito Madriaga Lim, a Philippine resident and citizen, to work aboard the OSFI DB-1, a foreign-flagged vessel whose home port is Port Vila, Vanuatu. The Philippine government requires foreign employers or their agents to employ Filipino workers through the Philippine Overseas Employment Administration (POEA), a department of the Ministry of Labor and Employment. The POEA-mandated employment contracts for seamen incorporate the Philippine government's Standard Terms and Conditions Governing the Employment of Filipino Seafarers On Board Ocean-Going Vessels (Standard Terms).

Lim's employment contract was executed through the POEA and subject to the Standard Terms. Those terms include dispute resolution procedures, which require, *inter alia,* resolving employment claims through arbitration in the Philippines. Section 29 of the Standard Terms states:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrators or panel of arbitrators. . . .

Lim filed this action against OSFI in the United States District Court for the Eastern District of Louisiana, claiming violations of the minimum wage and maximum hour (overtime) requirements of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA). *See* 29 U.S.C. §§ 206, 207. Lim's first amended complaint (before OSFI answered) made this an opt-in collective action, pursuant to 29 U.S.C. § 216(b). Approximately 100 similarly-situated Filipino seamen have opted in.

In its answer, and based on the Standard Terms' arbitration clause, OSFI claimed, *inter alia,* lack of subject matter jurisdiction (Rule 12(b)(1)) and improper venue (Rule 12(b)(3)). OSFI moved to dismiss, claiming: the Standard Terms require arbitration in the Philippines;

and the Convention, as implemented at 9 U.S.C. § 201 *et seq.* as Chapter 2 of the Federal Arbitration Act (FAA), requires district court enforcement of the arbitration clause. (Both the Philippines and the United States are signatories to the Convention.)

Plaintiffs responded that, although our court had held the Convention applies to seamen's contracts, *see Francisco v. STOLT ACHIEVEMENT MT,* 293 F.3d 270, 273 (5th Cir.), *cert. denied,* 537 U.S. 1030, 123 S.Ct. 561, 154 L.Ed.2d 445 (2002), the decision was in error and the Convention should not apply. In the alternative, plaintiffs asserted that the arbitration clause is unenforceable for three reasons. First, arbitration has never been required in seamen's wage litigation. Second, the arbitration clause is contrary to Louisiana public policy against a forum selection clause in an employment contract. (An arbitration clause is a subset of a forum selection clause. *See Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).) And third, the arbitration clause is invalid under the terms of the Convention, because plaintiffs' FLSA claims are rooted in United States law and can not be resolved through foreign arbitration.

The district court denied dismissal, holding the arbitration clause violated Louisiana law, which signaled a strong public policy against a forum selection clause in an employment contract and rendered the clause unenforceable. Accordingly, the district court stated it did not need to address the other two exceptions advanced by plaintiffs.

OSFI moved for rehearing or, in the alternative, for the district court to certify the jurisdiction and venue issues to this court for interlocutory appeal, pursuant to 28

U.S.C. § 1292(b). The district court chose the latter and offered the following controlling questions for interlocutory appeal: (1) whether the Convention or the Supremacy Clause of the United States Constitution, Article VI, clause 2, requires enforcement of the arbitration agreement in the employment contract; (2) if so, whether there is an exception, based on Louisiana's anti-forum selection clause statute, La.Rev.Stat. Ann. § 23:921(A)(2) (2004); (3) if the Louisiana statute is not preempted, whether it applies to the employment contract; and (4) if so, whether plaintiffs agreed to, or ratified, the arbitration clause pursuant to the exception in the Louisiana statute. Our court granted OSFI's motion to appeal.

II.

"As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question[s] formulated by the district court." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (emphasis in original). The above-noted questions presented in the district court's order assist in determining the propriety of the ruling; but they fail to include the other two exceptions claimed in district court by plaintiffs, which are also advanced here and which we address. (No authority need be cited for the rule that an issue presented in district court, but not ruled on there, may be raised on appeal in support of the ruling being challenged.) OSFI's method of invoking the Convention must be addressed first, however.

A.

Plaintiffs seek relief because OSFI did not request the district court to stay these proceedings and order arbitration. OSFI responds that, based on the arbitration clause, it properly moved to dismiss, under Rules 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(3) (improper venue). As noted, foreign arbitration clauses are deemed a "subset of foreign forum selection clauses in general". *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER,* 515 U.S. 528, 534, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). Therefore, analysis of foreign forum selection clauses can be extended to foreign arbitration clauses. *Id.*

1.

Our court has noted, but declined to address, the "enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed.R.Civ.P. 12(b)(1) [or] 12(b)(3). . . ." *Haynsworth v. The Corporation,* 121 F.3d 956, 961 (5th Cir.1997), *cert. denied,* 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998). In any event, our court has treated a motion to dismiss based on a forum selection clause as properly brought under Rule 12(b)(3) (improper venue). *Albany Ins. Co. v. Almacenadora Somex, S.A.,* 5 F.3d 907, 909 & n. 3 (5th Cir.1993). We have also affirmed, without comment on procedural posture, a district court's granting a Rule 12(b)(3) motion to dismiss based on a forum selection clause. *Mitsui & Co. (USA), Inc. v. MIRA M/V,* 111 F.3d 33, 37 (5th Cir.1997). And, other circuits agree that a motion to dismiss based on an arbitration or forum selection clause is proper under Rule 12(b)(3). *See Continental Ins. Co. v. Polish S.S. Co.,* 346 F.3d 281, 282 (2d Cir.2003) (affirming Rule 12(b)(3) dismissal in favor of foreign

arbitration); *Lipcon v. Underwriters at Lloyd's, London,* 148 F.3d 1285, 1290 (11th Cir.1998), *cert. denied,* 525 U.S. 1093, 119 S.Ct. 851, 142 L.Ed.2d 704 (1999) (motion to dismiss based on forum selection clause in international agreement should be brought under Rule 12(b)(3)); *Argueta v. Banco Mexicano, S.A.,* 87 F.3d 320, 324 (9th Cir.1996) (Rule 12(b)(3) motion proper method to invoke forum selection clause); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir.1995) (same).

Although circuits are split on the issue of whether Rule 12(b)(1) or 12(b)(3) is the proper motion for seeking dismissal based on a forum selection or arbitration clause, *see* 5B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1352 (3d ed.2004), neither side has substantively briefed the merits of the question. Because our court has accepted Rule 12(b)(3) as a proper method for seeking dismissal based on a forum selection clause, we need not decide whether a Rule 12(b)(1) motion would be appropriate.

2.

Claiming a right to trial to determine whether they are required to arbitrate, plaintiffs rely on 9 U.S.C. § 4 (allowing "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition district court to direct arbitration). Plaintiffs do not explain how this statute applies. Because the issue is not adequately briefed, we decline to address it. *See United States v. Thames,* 214 F.3d 608, 611 n. 3 (5th Cir.2000); *see also* Fed. R.App. P. 28(a)(9)(A).

B.

Accordingly, we turn to the order under review. We need only address two issues because (1) the Convention and the Supremacy Clause require enforcement of the arbitration clause; and (2) there is no exception to that requirement based on any one of the three advanced by plaintiffs, including Louisiana's anti-forum-selection-clause statute.

1.

The Supremacy Clause provides that laws and treaties arising under the Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ." U.S. Const. art. VI, cl. 2. It goes without saying that, upon the United States signing a treaty and Congress adopting enabling legislation, the treaty becomes the supreme law of the land. *E.g., Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140, 1145 (5th Cir.1985). It also goes without saying that whether the Supremacy Clause and the Convention require enforcement of the arbitration clause is a question of law, reviewed *de novo*. *E.g., Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 382 (5th Cir.2004).

In 1970, Congress enacted the Convention's enabling legislation, 9 U.S.C. §§ 201-208 (Convention Act). *E.g. Scherk*, 417 U.S. at 520 n. 15, 94 S.Ct. 2449. If an international arbitration clause falls under the Convention Act, "the Convention requires district courts to order arbitration". *Sedco*, 767 F.2d at 1145; *see also* 9 U.S.C. § 201 ("The Convention . . . shall be enforced in United States courts. . . .").

The Convention applies to international arbitration clauses when "(1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) *a party to the agreement is not an American citizen*". *Francisco,* 293 F.3d at 273 (emphasis added); *see also* 9 U.S.C. § 202 (listing same requirements). In *Francisco*, our court considered a Filipino seaman's employment contract identical to the one at issue and clarified that such contracts "arise[] out of a commercial legal relationship". 293 F.3d at 273. Thus, plaintiffs' contracts are controlled by the Convention: the contracts are in writing; they require arbitration in the Philippines, a signatory to the Convention; they describe a "contractual legal relationship"; and plaintiffs are not American citizens. (Plaintiffs seek reconsideration of our court's holding in *Francisco* that the Convention applies to seamen's employment contracts. Barring a change of law, "[i]t has long been a rule of this court that no panel of this circuit can overrule a decision previously made by another". *Legros v. Panther Servs. Group, Inc.,* 863 F.2d 345, 349 (5th Cir.1988).)

Because the United States is a signatory to the Convention, and Congress enacted enabling legislation, the Convention is applicable as federal law in this case. Further, unless there is an exception, as discussed below, the Convention requires the arbitration clause in plaintiffs' employment contracts be honored.

2.

Accordingly, we turn to whether there is an exception to the Convention's mandate that the employment claims in question be arbitrated according to the Standard Terms. Of course, whether a forum selection or arbitration clause is enforceable is a question of law reviewed *de novo. E.g., Mitsui,* 111 F.3d at 35. Likewise, questions of preemption are reviewed *de novo. E.g., Witty,* 366 F.3d at 382.

OSFI maintains the Standard Terms' arbitration clause applies without exception to plaintiffs' claims. Plaintiffs dispute that on three bases. They maintain: (1) the clause is unreasonable, and therefore invalid, under the test announced in *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (forum selection clause valid unless contravenes strong public policy), because the Louisiana statute evinces a strong public policy against arbitration clauses in employment contracts; (2) the arbitration clause is invalid because arbitration is not warranted in seamen's wage litigation; and (3) their FLSA claims are not arbitrable, so the Convention, by its own terms, does not apply.

a.

Unlike the Convention, Louisiana law *prohibits* employers' use of choice of forum and choice of law clauses in employment contracts:

> The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement,

> or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void. . . .

La.Rev.Stat. § 23:921(A)(2). Again, the Supremacy Clause declares that federal law "shall be the supreme Law of the Land[,] . . . any Thing in the Constitution or *Laws of any State* to the Contrary notwithstanding". U.S. Const. art. VI, cl. 2 (emphasis added). "Where [state] laws conflict with a treaty, they must bow to the *superior federal policy.*" *Zschernig v. Miller,* 389 U.S. 429, 441, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) (emphasis added).

i.

OSFI maintains the Convention preempts Louisiana law. It analogizes that preemption question to those presented in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), and *OPE International, L.P. v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir.2001).

Southland held § 2 of the FAA, which declares arbitration clauses in American contracts "shall be valid, irrevocable, and enforceable", preempted a California statute forbidding arbitration of disputes arising from interstate contracts between franchisors and franchisees. 465 U.S. at 10, 104 S.Ct. 852. *OPE International* held the FAA preempted a Louisiana statute forbidding arbitration of contracts for public and private works when one party was located, and the work was done, in Louisiana. 258 F.3d at 447.

OSFI relies properly on *Southland* and *OPE*. "In substance, the Convention replicates the Federal Arbitration Act." *Sedco,* 767 F.2d at 1146. Both statutes apply to employment contracts in general. *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 109, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (FAA applies to employment contracts other than seamen's and transportation workers' contracts as exempted by § 1); *Francisco*, 293 F.3d at 273 (Convention applies to seamen's employment contracts).

Southland noted that, in the FAA, Congress "declared a *national policy* favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration". 465 U.S. at 10, 104 S.Ct. 852 (emphasis added). The Louisiana anti-forum-selection-clause statute conflicts directly with the Convention's mandate to enforce arbitration clauses. Applying a straightforward preemption analysis, the Convention, as the "supreme Law of the Land", preempts the directly conflicting Louisiana statute, unless, as plaintiffs claim, it satisfies an exception to the Convention.

ii.

According to plaintiffs, the arbitration clause should not be enforced because it is contrary to strong Louisiana public policy. The Supreme Court has held forum selection clauses in international contracts are "prima facie valid" and should be upheld absent a clear showing of unreasonableness, unjustness, overreaching, or fraud. *M/S Bremen*, 407 U.S. at 10, 15, 92 S.Ct. 1907. *M/S Bremen* held a choice of forum clause may be unreasonable when "enforcement would contravene *a strong public policy of the*

forum in which suit is brought, whether declared by statute or by judicial decision". *Id.* at 15, 92 S.Ct. 1907 (emphasis added). The Convention mirrors this policy concern by allowing a court charged with enforcing an arbitral award to refuse enforcement if "[t]he recognition or enforcement of the award would be contrary to *the public policy of that country*". Convention, art. V, § 2(b) (emphasis added).

Forum is broadly defined as "[a] court or other judicial body; a place of jurisdiction". BLACK'S LAW DICTIONARY (8th ed.2004). In performing the instant *M/S Bremen* reasonableness analysis, an underlying issue is which forum – the United States or Louisiana – is relevant for purposes of the test. As they did in district court, plaintiffs assume Louisiana is the relevant forum. The district court agreed, noting that, although plaintiffs raised claims under a federal statute (FLSA) in federal court, they could have brought them in state court. It ruled: "The fortuity (for defendant) of plaintiffs electing to bring their claims in federal court should not exempt defendant from Louisiana laws *intended to apply to employers in this state*". *Lim v. Offshore Specialty Fabricators, Inc.*, No. 02-2126, 2003 WL 193518 (E.D.La. 28 January 2003) (order denying motions to dismiss) (emphasis added).

On the other hand, it is quite understandable that the Convention and its enabling act imply that the forum at issue is national, rather than local. *Cf.* Convention, art. V, § 2(a) (allowing a country to refuse enforcement of an arbitral award if the award violates the country's public policy); 9 U.S.C. § 205 (giving federal courts jurisdiction over cases to which the Convention applies, regardless of amount in controversy). Likewise, the Convention envisions the applicable forum to be the signatory country, not

individual states within it. *See* Convention, art. XI, § (a) (clarifying that the obligations of a signatory with a federal government are the same as those of a signatory that is a unitary state). Further, for obvious reasons, when analyzing the reasonableness of a choice of forum clause in an international contract, courts do not ignore federal law and policy. *See Afram Carriers, Inc. v. Moeykens,* 145 F.3d 298, 302-03 (5th Cir.1998), *cert. denied,* 525 U.S. 1141, 119 S.Ct. 1031, 143 L.Ed.2d 40 (1999); *Lipcon,* 148 F.3d at 1298-99; *Dahiya v. Talmidge Int'l, Ltd.,* 371 F.3d 207, 220 (5th Cir.2004) (DeMoss, J., dissenting).

Because plaintiffs brought FLSA claims in federal court, and the contested clause mandates arbitration in a foreign country (as opposed to a State), the relevant forum is arguably the United States, a signatory to the Convention. On this record, including plaintiffs' not being residents of Louisiana, as discussed *infra,* we need not decide whether the United States is the relevant forum. Accordingly, we will consider both United States and Louisiana public policy in our *M/S Bremen* reasonableness analysis.

(a)

Plaintiffs contend the arbitration clause is unenforceable in the light of Louisiana's strong public policy against choice of forum clauses, as evidenced both by the above-quoted statute, La.Rev.Stat. § 23:921(A)(2), and by judicial decision, *Sawicki v. K/S STAVANGER PRINCE,* 802 So.2d 598 (La.2001). OSFI relies on the dissent in *Dahiya* to support its response that Louisiana public policy against a choice of forum clause (arbitration clause) in employment contracts does not outweigh the federal policy of enforcing international arbitration clauses.

For obvious reasons, a party opposing, on public policy grounds, enforcement of an international arbitration clause must meet a "heavy burden of proof". *M/S Bremen*, 407 U.S. at 17, 92 S.Ct. 1907. "[T]here is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity". *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir.2004) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).

The above-quoted § 23:921(A)(2) of the Louisiana Labor and Worker's Compensation Code, enacted in 1999, prohibits choice of forum or choice of law clauses in *all* employment contracts. *Sawicki*, 802 So.2d at 603. Section 23:921(A)(2) is a subsection of a statute concerning restraints on business; the Louisiana Supreme Court has held generally that the statute demonstrates "strong Louisiana public policy concerning forum selection clauses". *Id.* at 603. Accordingly, as plaintiffs note, both Louisiana statute and judicial decision evince a policy against enforcement of arbitration clauses in employment contracts.

(b)

As has been done for the contrary Louisiana public policy, the federal public policy favoring domestic and international arbitration agreements has been declared by both statute and judicial decision. Repeatedly, Congress has endorsed arbitration clauses, first through passage of the FAA, and then through adoption of the Convention and implementation of the Convention Act. Likewise, federal courts have supported this strong policy in favor of arbitration. "[Q]uestions of arbitrability must be addressed

with a healthy regard for the federal policy favoring arbitration." *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647. In the context of the Convention, the Supreme Court held:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (emphasis added); *see also Scherk,* 417 U.S. at 520 n. 15, 94 S.Ct. 2449. More specifically, federal courts have endorsed federal arbitration policy by applying the Convention to seamen's employment contracts. *See Francisco,* 293 F.3d at 274; *Bautista v. Star Cruises,* 396 F.3d 1289, 1300 (11th Cir.2005).

In addition, in weighing these competing policy concerns, it must be noted that *plaintiffs' employment contracts do not present the inequities the Louisiana statute was crafted to prevent.* That statute seeks to protect Louisiana citizen-employees from being subjected to litigation in a foreign forum, under laws with which they are not familiar and before a foreign body. *See* Testimony of Representative Jackson, Official Minutes of Louisiana Senate Committee on Labor and Industrial Relations, Hearing on Senate Bill 915 (22 April 1999). Plaintiffs are Philippine residents and citizens. Their employment contracts do not require them to bring claims in a foreign forum, but instead require OSFI to submit to

arbitration in plaintiffs' home country, before plaintiffs' countrymen.

In sum, on this record, given the strong federal policy in favor of international arbitration agreements in general, and the application of the Convention to seamen's employment contracts in particular, the overall balance of public policy concerns favors enforcing the arbitration agreements. Plaintiffs do not meet the "high burden of proof" necessary to show public policy renders the arbitration clause unreasonable.

b.

For the second claimed exception, plaintiffs maintain "[a]rbitration has never been required in seamen's wage litigation" and clauses requiring such arbitration are invalid. They cite *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971), which applied § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA) (providing federal remedy to enforce grievance and arbitration provisions of collective bargaining agreements). *Arguelles* held § 301 did not deprive seamen of their right to assert in federal court wage claims arising under 46 U.S.C. § 596 (now 46 U.S.C. § 10313) (controlling seamen's individual wage claims against employer). *Id.* For the following reasons, *Arguelles* is distinguishable.

First, the claims in *Arguelles* addressed seamen's judicial remedies for denial of contractual wages. *Id.* at 354, 91 S.Ct. 409. Plaintiffs do *not* claim they were not paid according to their contract; instead, they make claims under the FLSA for extra-contractual wages. Also at issue in *Arguelles* was the duty to follow the collective bargaining

grievance procedure under the LMRA, a statute and procedure absent here. Finally, while the *Arguelles* court refused to hold § 301 of the LMRA replaced access to courts, the Court did not declare seamen's wages conclusively exempt from arbitration in all situations. *Id.* at 356, 91 S.Ct. 409 (seamen may, if they choose, "use the processes of grievance and arbitration").

c.

Plaintiffs' final claimed exception is that the Convention does not compel arbitration of their FLSA claims because they are not subject to arbitration. OSFI reserves the question of whether the FLSA applies to plaintiffs' claims, but contends that, in any event, they are subject to arbitration.

Article II of the Convention states: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration . . . concerning a subject matter *capable of settlement by arbitration*"; and "[t]he court of a Contracting State . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is . . . incapable of being performed". Convention, art. II, §§ 1, 3 (emphasis added). Article V states: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) *the subject matter of the difference is not capable of settlement by arbitration under the law of that country*". Convention, art. V, § 2 (emphasis added).

As noted, "individuals seeking to avoid the enforcement of an arbitration agreement face a high bar", even

when the claims at issue are statutory. *Carter*, 362 F.3d at 297. In *Gilmer*, the Supreme Court held federal statutory claims are subject to arbitration unless the party resisting arbitration can show "Congress intended to preclude a waiver of a judicial forum" for resolution of the claims. 500 U.S. at 26, 111 S.Ct. 1647. "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* The FLSA does not preclude arbitration by its terms or legislative history. *Carter*, 362 F.3d at 297. Therefore, plaintiffs must demonstrate an "inherent conflict" between arbitration and the purposes underlying the FLSA. *Gilmer*, 500 U.S. at 26, 111 S.Ct. 1647.

Instead of addressing "inherent conflict" directly, plaintiffs maintain arbitration "serves no purpose" because their FLSA claims are "rooted in United States law [and] are incapable of resolution by foreign arbitration". Without deciding whether plaintiffs' claims are subject to the FLSA, *see Haynsworth*, 121 F.3d at 966, we note that the NLRC, the Philippine body charged with arbitrating employment claims under Standard Terms § 29, is statutorily empowered to have "original and exclusive jurisdiction to hear and decide . . . the claims arising out of an employer-employee relationship or by virtue of *any law* or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages". Migrant Workers and Overseas Filipino Act of 1995, Republic Act 8042, § 10 (2004) (Phil.) (emphasis added), *available at* http://www.poea.gov.ph/html/ra8042.html. There is no reason to conclude the NLRC could not consider an action arising under the FLSA, *if* that statute applies to plaintiffs' claims.

III.

For the foregoing reasons, the dismissal-denial is VACATED and this matter is REMANDED to district court for further proceedings consistent with this opinion.

VACATED and REMANDED.

2003 WL 193518 (E.D.La.)

United States District Court,
E.D. Louisiana.
Joselito Madriaga LIM
v.
OFFSHORE SPECIALTY FABRICATORS, INC.
No. Civ.A. 02-2126.

Jan. 28, 2003.

BARBIER, J.

Before the Court is the Motion to Dismiss for Improper Venue and Lack of Subject Matter Jurisdiction (Rec.Doc. 11) filed by defendant. Plaintiff/Intervenors (collectively referred to hereinafter as "plaintiffs") oppose the motion. The motion was set for hearing on briefs on December 18, 2002. Because the Court concludes that the forum selection clauses defendant seeks to enforce by the instant motion are void as violative of Louisiana public policy, the Court finds the motion must be denied as more fully explained below.

BACKGROUND

Plaintiffs are Filipino seamen employed by defendant Offshore Specialty Fabricators, Inc. ("OSFI"), a Louisiana corporation, through its agent, Cream Ship Management. Plaintiffs worked for OSFI aboard a vessel named OSFI DB-1, a foreign-flagged vessel whose home port is Port Vila, Vanuatu. Plaintiffs filed suit alleging that defendant violated the minimum wage requirements of the Fair Labor Standards Act ("FLSA") by failing to pay them for overtime hours they worked. Defendant has filed the instant motion arguing that plaintiffs' suit must be dismissed because their claims in this action are subject to a

valid and enforceable forum selection clause and mandatory arbitration agreement incorporated in the plaintiffs' employment contracts with OSFI.

Plaintiffs were hired by OSFI through the Philippine Overseas Employment Administration ("POEA"), a Philippine agency whose duties include, *inter alia,* prescribing standard employment contracts for Philippine overseas workers. In accordance with POEA requirements, plaintiffs' contracts include Standard Terms which govern their employment, including a forum selection clause and an arbitration clause. Under Section 16 of the Standard Terms, grievances which go beyond the administrative process are to be appealed to the management of the company, the Philippine Overseas Labor Office or consular office overseas, or alternatively, to the POEA or the National Labor Relations Commission ("NLRC"), both located in the Philippines. Section 29 provides for "original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators," or, if not covered by a collective bargaining agreement, to the NLRC in the Philippines. That section further provides that the POEA "shall exercise original and exclusive jurisdiction to hear and decide disciplinary action on cases, which are administrative in character, involving or arising out of violations of recruitment laws, rules and regulations involving employers, principal, contracting partners and Filipino seafarers."[1]

Plaintiffs oppose the motion to dismiss based on three arguments: first, that arbitration is not required in wage litigation, citing *U.S. Bulk Carriers, Inc. v. Arguelles,* 400

[1] The full contract may be found in the record at Rec. Doc. 11, Exh. 1.

U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971); second, that plaintiffs' congressionally created wage and hour claims and other rights rooted in United States law are incapable of resolution by foreign arbitration; and third, that Louisiana's prohibition of forum selection clauses in employment contracts under Louisiana Revised Statutes title 23, section 921 applies to the contracts between OSFI and plaintiffs, rendering the forum selection and arbitration clauses in their contracts void. Because the Court is persuaded by plaintiffs' third argument, it pretermits a discussion of the first two.

DISCUSSION

In *M/S BREMEN v. Zapata Offshore,* 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), the Supreme Court recognized that forum selection clauses (of which arbitration clauses are a subset) are presumptively valid in admiralty cases. At the same time, however, the Court observed that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision." 407 U.S. at 15, 92 S.Ct. at 1916 (citations omitted).

Louisiana has expressed its hostility to forum selection clauses in employment contracts in both statute and judicial decision. Louisiana Revised Statute 23:921A(2) provides:

> The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of

> employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

Likewise, the Louisiana Supreme Court has held: "the United States Supreme Court in *M/S Bremen* held that forum selection clauses will be upheld unless they contravene strong public policy of the forum in which the suit is brought. La.Rev.Stat. 23:921A(2) is an expression of strong Louisiana public policy concerning forum selection clauses." *Sawicki v. K/S Stavanger Prince,* 802 So.2d 598, 603 (La.2001). Thus, the plain language of both La. R.S. 23:921A(2) and the Louisiana Supreme Court's opinion in *Sawicki* reflect that forum selection clauses in employment contracts, such as those invoked by defendant in the instant case, contravene a strong public policy of Louisiana; under the U.S. Supreme Court's decision in *M/S Bremen,* they are therefore unenforceable.

In arguing that the forum selection clauses included in plaintiffs' contract should be enforced notwithstanding Louisiana's stated public policy, defendant points to the Fifth Circuit's 1998 decision in *Marinechance Shipping Ltd. v. Sebastian,* in which the Fifth Circuit affirmed a district court's enforcement of nearly identical clauses in another POEA seaman's contract. However, *Marinechance* offers no guidance for the case at bar because it predates both the 1999 amendment to La. R.S. 23:921 which added section A(2) (upon which this decision rests), and the

Louisiana Supreme Court's 2002 decision in *Sawicki*. Indeed, Judge Feldman, the district judge who authored the original *Marinechance* opinion enforcing the POEA contract forum selection clauses, recently issued an opinion taking the opposite view in light of the 1999 amendments to La. R.S. 23:921 and *Sawicki*. *Dahiya v. Talmidge International, Ltd.*, Civ. Action 02-2135, 2002 WL 31962151 (E.D.La., Oct. 11, 2002). Moreover, *Sawicki* itself represented a reversal of the Louisiana Supreme Court's prior stance (enunciated in *Lejano v. K.S. Bandak*, 705 So.2d 158 (La.1997) and upholding such clauses in POEA contracts), based on the 1999 amendment to La. R.S. 23:921. Thus, all courts which have considered this precise question[2] after the 1999 amendments have recognized the unenforceability of forum selection clauses in employment contracts in view of the current law in Louisiana.

Defendant also argues that Louisiana's policy, both as expressed in statute and judicial decision, is of no moment because plaintiff brought this case in federal court, albeit one sitting in Louisiana. And, while acknowledging that plaintiffs could have originally filed in state court, defendant claims that had plaintiffs done so, defendant would simply have removed the case to federal court.

Setting aside the question whether grounds for removal would have been present, the Court notes that another federal court has already found that removal from

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[2] While the Fifth Circuit's 2002 decision in *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir.2002) did uphold an arbitration clause in a similar POEA contract, the *Francisco* plaintiffs did not argue that such clauses violated Louisiana public policy, and neither the district court nor the Fifth Circuit considered that precise question. Accordingly, *Francisco* is not controlling.

state court does not nullify La. R.S. 23:921A(2) – that is exactly the posture of the *Dahiya* case in which Judge Feldman applied the statute. More to the point, defendant is a Louisiana corporation, and (as defendant concedes) plaintiffs could have brought their FLSA claims in state court. 29 U.S.C. § 216(b). The fortuity (for defendant) of plaintiffs electing to bring their claims in federal court should not exempt defendant from Louisiana laws intended to apply to employers in this state.

Finally, the Court disagrees with defendant's assertion that La. R.S. 23:921 does not foreclose enforcement of the forum selection clauses in the instant case because by its terms, 23:921 does not apply when an employee "expressly, knowingly, and voluntarily agree[s] to and ratifie[s]" a forum selection clause contained in his or her employment contract, and, by signing the POEA contracts, plaintiffs "expressly, knowingly, and voluntarily agreed to and ratified" the forum selection clauses invoked by defendant herein. The ratification contemplated by 23:921 must take place "after the occurrence of the incident which is the subject of the civil or administrative action." While the Court recognizes that plaintiffs contracted to work hours deviating from those prescribed by the FLSA, nothing in the record suggests that they contracted in advance to work the hours they allege to have worked at the rate they allege to have been paid, and which they complain of in the instant action. Thus, as a matter of logic, they cannot have ratified the forum selection clauses after the occurrence of the incident that is the subject of their complaints.

In sum, based on the foregoing analysis, the Court finds that forum selection clauses invoked by defendant

(including the arbitration provision which is a type of forum selection clause), are unenforceable. Accordingly;

IT IS ORDERED that defendant's Motion to Dismiss for Improper Venue and Lack of Subject Matter Jurisdiction (Rec.Doc. 11) should be and is hereby DENIED.

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 04-1716

In the Supreme Court of the United States

JOSELITO MADRIGA LIM, on behalf of himself and all other current and former employees of Offshore Specialty Fabricators, Inc., similarly situated; ADELITO M. AGANON; RICHARD AGCAOILI; LUIS ABNABO; ANTONIO P. ALCANTARA, et al.,

Petitioners,

v.

OFFSHORE SPECIALTY FABRICATORS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CORNELIUS R. HEUSEL
Counsel of Record
JENNIFER L. ANDERSON
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, L.L.P.
201 ST. CHARLES AVENUE, 47TH FLOOR
NEW ORLEANS, LA 70170
(504) 582-8000
(504) 582-8015 FAX

Counsel for Respondent

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether Petitioners meet any Rule 10 requirement for review of the United States Court of Appeals for the Fifth Circuit's decision in *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005), enforcing the international arbitration agreements between Petitioners, Filipino seafarers, and Respondent, Offshore Specialty Fabricators, Inc., in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.*, and maintaining uniformity of controlling federal law. *See Francisco v. STOLT ACHIEVEMENT*, 293 F.3d 270, 271-72 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030, 123 S.Ct. 561, 154 L.Ed.2d 445; *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), *cert. denied*, 125 S.Ct. 2954 (2005).

RULE 24 CERTIFICATE

Counsel for Respondent, Offshore Specialty Fabricators, Inc., certifies that the "List of Parties" on pages ii-v of Petitioners' Petition for Writ of Certiorari reflects the parties appearing here and before the United States Court of Appeals for the Fifth Circuit who now have an interest in the outcome of this action.

CORPORATE DISCLOSURE STATEMENT

Respondent, Offshore Specialty Fabricators, Inc., is a private, domestic nongovernmental corporation in which no public corporation owns a 10% or greater interest. Respondent's only parent is Offshore Domestic Group, Inc., also a private, domestic nongovernmental corporation.

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STATEMENT OF THE CASE AND CORRECTION OF THE RECORD

The record of this action bears no allegations or evidence to support the factual representations in the Petitioners' Statement of the Case. Therefore, Respondent hereby discharges its obligation under Rule 15.2 to correct the record.

The record, including Petitioners' Complaint, as amended, contains no allegations or evidence that they worked in a "labor-camp-like fabrication yard" or "barges moored to the labor camp." The record also contains no allegations or evidence that the Petitioners "were required to live on the [unspecified] premises . . . enclosed by a [sic] chain-link fencing, topped with razor wire." The record likewise contains no allegations or evidence that "[a]ny employee escaping the premises was apprehended and returned by the local sheriff," or of the particularly sensational accusation that "[w]orking and housing conditions of petitioners were tantamount to incarceration." No doubt, Petitioners hope their wild allegations, presented to this Court for the first time and appearing nowhere in the record, will cloud reason with emotion. Instead, the record reflects that the Petitioners, Filipino citizens, worked aboard Respondent's foreign-flagged vessels pursuant to international employment contracts containing arbitration agreements mandated by, and specified wage rates approved by, their own government. The record contains no denial by Petitioners of "knowledge" or the "existence" of the provisions of the international arbitration agreements at issue, and in fact Petitioners stipulated to the authenticity of the agreements in the District Court.

The record of this action in reality reflects that Petitioners are residents and citizens of the Republic of the Philippines

and were employed by Respondent, Offshore Specialty Fabricators, Inc. ("OSFI"), a Louisiana corporation, to work aboard foreign-flagged vessels whose home port is Port Vila, Vanuatu. As required by their government, the Filipino seafarers were hired through the Philippine Overseas Employment Administration ("POEA"), an agency of the Philippine Ministry of Labor and Employment, pursuant to international contracts that incorporate their government's Standard Terms and Conditions Governing the Employment of Filipino Seafarers On-Board Ocean-Going-Vessels (the "Standard Terms"). OSFI was required by Petitioners' government to enter into these agreements in order to employ them.

The POEA was established by the Philippine government "'to promote and develop overseas employment opportunities and to afford protection to Philippine workers and their families.'" *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 219 (5th Cir. 1998), *cert. denied*, 525 U.S. 1055, 119 S.Ct. 620, 142 L.Ed.2d 559 (1998), quoting *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218 (3rd Cir. 1991); *Francisco*, 293 F.3d at 271-72. The POEA "has promulgated extensive rules and regulations controlling overseas employment to accomplish these objectives." *Cruz*, 932 F.2d at 221. The POEA requires, among other things, that Filipino seafarers seeking employment abroad register with the POEA, that their wages be approved by the POEA, and that they be employed pursuant to international employment contracts including mandatory arbitration, forum selection, and choice of law provisions prepared by the POEA. *Id.* All POEA agreements provide that they "shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory." *Id.*